LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 24 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 493

ISAIAH H. HAMMONS, *Petitioner*

v.

THE STATE OF OREGON, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

MAURICE A. GUERVITZ
1010 Vermont Avenue, N. W.
Washington, D. C.

MILTON HELLER
Washington Building,
Washington, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional Provisions Involved	2
Statement of the Case	5
Reasons for Granting the Writ	5
Conclusion	13

• • • •

Reasons for Granting the Writ	5-12
I Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court permitted petitioner's court-appointed attorney to withdraw from the pending appeals case and failed to appoint other counsel to represent appellant-defendant?	5
II Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court failed to give due and adequate notice to appellant-defendant before granting order of default?	10
III Did the Court deprive the petitioner of his rights under the Constitution of the United States when it denied appellant-defendant's motions for relief from default?	12

TABLE OF APPENDICES

A. Judgement and Sentence	1a
B. Order Allowing Attorney's fees	2a
C. Notice of Appeal	2a
D. Defendant-Appellant Designation or Record on Appeal	3a
E. Order Settling Transcript	4a

Page

F. Motion for Withdrawal of Attorney 4a
G. Affidavit accompanying Motion for Withdrawal of Attorney 5a
H. Order extending time to file brief 6a
I. Order relieving counsel 6a
J. Notice of dismissal of appeal 7a
K. Motion for Extension of time to File Appellant's Brief 7a
L. Letter of April 16, 1965, from Clerk of Court to L. B. Sandblast re. Motion for Extension of Time.. 8a
M. Motion to Dismiss Appeal 9a
N. Motion to Relieve Appellant of Order of Default .. 10a
O. Affadivit accompanying Motion for Withdrawal of Attorney 10a-11a
P. Order of June 2, 1965, dismissing appeal 12a
Q. Motion for Reconsideration 13a
R. Order denying Motion for Reconsideration 14a

TABLE OF AUTHORITIES AND STATUTES

Betts v. Brady, 316 U.S. 445 9
Ellis v. United States, 356 U.S. 674 7
Foley v. United States, 354 U.S. 521 7
Gideon v. Wainwright, 372 U.S. 335 9
Milliken v. Meyer, 311 U.S. 457 11
Oregon Revised Statutes—Chapter 19,033 6
Powell et al v. State of Alabama, 287 U.S. 45 8
Priest v. Las Vegas, 232 U.S. 604 11
Roller v. Holley, 176 U.S. 398 11
Speers v. Gladden, 390 Pac. 2d 635 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

ISAIAH H. HAMMONS, *Petitioner*

v.

THE STATE OF OREGON, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Isaiah H. Hammons, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above case on June 2nd, 1965.

OPINIONS BELOW

A certified copy of the opinion of the Supreme Court of the State of Oregon accompanies this petition. (Appendix P)

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered June 2nd, 1965. A timely Motion for Reconsideration was filed (Appendix Q) and was denied by said Court by its order of June 29, 1965.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

I. Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court permitted petitioner's court-appointed attorney to withdraw from the pending appeals case and failed to appoint other counsel to represent appellant-defendant?

II. Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court failed to give due and adequate notice to the appellant-defendant before granting order of default?

III. Did the Court deprive the petitioner of his rights under the Constitution of the United States when it denied appellant-defendant's motions for relief from default?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Sixth Amendment and the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States. The State Constitutional provisions and statutes referred to are only incidentally connected with the federal questions raised.

STATEMENT OF THE CASE

The petitioner herein was indicted and convicted of a felony under the laws of the State of Oregon, to-wit, receiving and concealing stolen property, in the Circuit Court of the State of Oregon for the County of Multnomah. Nathan J. Ail was appointed by the Court to represent the defendant in his trial before said Circuit Court. Petitioner was an indigent defendant. Petitioner was tried and found guilty on August 31, 1964, and was sentenced to prison for a term of three years. (Appendix A) Subsequent thereto, said Mr. Ail was appointed by said Circuit Court to represent said petitioner as an indigent appellant-defendant with respect to appealing said judgment to the Supreme Court of the State of Oregon.

On October 19, 1964, said attorney filed notice of appeal to the Supreme Court of Oregon. (Appendix C) Designation of record on appeal and transcript of testimony and proceedings were settled and filed by said attorney in the Supreme Court. (Appendices D-E)

On January 25, 1965, said attorney filed a motion for withdrawal from said appeals case for the reason that, "in said attorney's judgment and opinion, no prejudicial error appears in the defendant's trial Court record and there is therefore no substantial question to be raised by an appeal in this case." The motion also requested an order allowing appellant an extension of time in which to file appellant's brief "in the event appellant desires to obtain other counsel to prosecute this appeal." (Appendices F-G)

By order of January 26, 1965, (Appendix H) the Court extended the time for filing of appellant's brief to March 1, 1965.

On February 15, 1965, the Court by its order granted Mr. Ail's motion and relieved him as attorney for said

appellant-defendant in any further proceedings in connection with said appeal. (Appendix I)

No substitute attorney was ever appointed by the Court nor was the appellant ever notified that he had to March 1, 1965, to file his brief; nor was he ever advised by said Court as to what would occur in connection with said appeal if no brief were filed in the case.

By Notice of March 16, 1965, (Appendix J) the Clerk of the Supreme Court notified Mr. Ail as "Attorney for Appellant" and the State's attorney that the appellant was in default for failure to file his brief; that said appeal will be dismissed for want of prosecution, pursuant to the rules of said Court (Page 6), unless good cause be shown within thirty days why the appeal should be retained on the docket.

On April 16, 1965, L. B. Sandblast entered his appearance in said appeals case and filed a motion for an extension of time within which to file appellant's brief. Said motion was subsequently denied, by letter from the Clerk of the Supreme Court to Mr. Sandblast dated April 16, 1965, stating that "the Chief Justice will not sign an order at this time extending time, but it will be necessary for you to file a motion pursuant to Rule 35." (Appendices K-L)

On May 17, 1965, the District Attorney filed Motion to Dismiss Appeal for the reason that the appellant had been in default since March 1, 1965, in filing his brief and that appellant had failed to file application for relief from default. (Appendix M)

On May 25, 1965, said attorney filed Motion to Relieve Appellant of Order of Default. (Appendices N-O)

On June 2, 1965, (Appendix P) the Supreme Court by its order denied said motion. On June 28, 1965, appellant filed Motion for Reconsideration of Order Denying Relief from Order of Default. (Appendix Q)

On June 29, 1965, the Supreme Court denied appellant's motion for reconsideration. (Appendix R)

REASONS FOR GRANTING THE WRIT

This case is of importance far beyond the particular matter involved. It involves a fundamental constitutional issue as to preserving a citizen's rights in criminal prosecution. It is fundamental that a citizen is entitled to the assistance of counsel at all stages of his defense. The necessity of counsel is so vital and imperative that the failure of a court to make an effective appointment of counsel is a denial of due process within the meaning of the Constitution. Further, the Court shall not deny a citizen of his constitutional rights by arbitrarily and capriciously applying rules of the Court which would prevent a citizen from prosecuting and completing an appeal from an adverse ruling by a lower court.

I

Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court permitted petitioner's court-appointed attorney to withdraw from a pending appeals case and failed to appoint other counsel to represent said appellant-defendant?

Petitioner was an indigent defendant in a criminal case involving a felony. He was convicted and his trial attorney was appointed by the trial (Circuit) court to prosecute an appeal. Appeal was duly filed and after said attorney had prepared and submitted

his designation of record to the Supreme Court and had settled and filed transcript of testimony and proceedings, the Circuit Court permitted said attorney to withdraw from the case on said attorney's own motion because at that time he saw no substantial question for adjudication. Notwithstanding that the appellant's brief was due to be filed within a short time, the Circuit Court took no steps whatsover to substitute any attorney or effectively apprise him of need to obtain other counsel of his own choosing, leaving the appellant without representation at a critical stage of the proceedings. It is also respectfully submitted that the Court failed fully to apprise the appellant what action he should take to protect his rights and what would be the consequences in connection with his appeal if appellant did nothing further in the matter.

Counsel for the appellant-defendant in the Circuit Court filed his motion to withdraw on February 15, 1965; the Court granted said motion by its order of February 15, 1965. Therefore, the appellant-defendant was without effective assistance of counsel from February 15, 1965, until April 16, 1965, when attorney L. B. Sandblast on behalf of the appellant filed Motion for Extension of time within which to file appellant's opening brief. (Appellant's brief was due on March 1, 1965) He was advised by the Clerk of the Supreme Court on April 16, 1965, that the Chief Justice will not sign an order "at this time extending time"; (Appendices K-L) that it would be necessary to file a motion pursuant to the following Statute:

CHAPTER. 19,033, OREGON REVISED STATUTES:

"After the Supreme Court has acquired jurisdiction of the cause, the omission of a party to perform any of the acts required in connection with

an appeal, or to perform such acts within the time required, shall be cause for dismissal of the appeal. In the event of such omission, the Supreme Court on motion of the respondent or, after notice, on its own motion, may dismiss the appeal if in its judgment the omission is without reasonable excuse or it may permit the party responsible for the omission to rectify the omission, by amendment or otherwise, on such terms and within such time as may be just."

On June 2, 1965, the Supreme Court denied appellant's motion to be relieved of default and dismissed the case. On June 29, 1965, the Court denied appellant's motion for reconsideration.

The Court deprived the petitioner of due process when it permitted his court-appointed attorney to withdraw from the appeals case in a most important and critical part of the proceedings, especially in view of the fact that said attorney had already filed his statement of what errors the lower court had made at the trial. Then after placing himself on record that the Court below had made error he takes an about face and claims there were no subtstantial errors.

In *Ellis* v. *United States,* 356 U.S. 674, this Honorable Court held:

"The only statutory requirement for the allowance of an indigent's appeal is the applicant's 'good faith' * * * * *

"In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Foley* v. *United States,* 354 U.S. 521.

"The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues

> raised are so frivolous that the appeal would be dismissed in the case of a non-indigent litigant * * * the request of an indigent for leave to appeal in forma pauperis must be allowed."

Speers v. *Gladden,* 390 Pac. 2d 635, involved a situation where a court-appointed attorney had filed an appeal in a criminal matter but before taking any further steps he filed a motion to withdraw from the case. The court permitted him to do so and the appellate court affirmed the action of the lower court. In its decision it cited *Ellis* v. *United States* (supra) but also held:

> "Our procedure is even more solicitous of the defendant's interests than that recognized in the Ellis case * * *. Upon appeal the court must again examine the record and assigned error. In the course of doing so it also scrutinizes the record for errors not assigned and * * * if it appears that the defendant has not received a fair trial, we will reverse and remand the case for a new trial."

There is much authority which holds that a defendant in a criminal case is deprived of due process when the court fails to provide an indigent defendant with the assistance of counsel during any critical stage of the proceedings. A landmark case is that of *Powell et al* v. *State of Alabama,* 287 U.S. 45, which holds:

> "* * * the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment."

From an examination of the records herein, especially Mr. Ail's motion to withdraw and the court's order permitting said attorney to withdraw, it is evi-

dent that the Court did not examine into the situation as to the good faith of the appellant nor did the court consider whether or not the appeal was frivolous. The only conclusion that can be drawn is that the court accepted said attorney's motion at face value and granted same without any further investigation. The fact that Mr. Ail was able to prepare a list of errors which the lower court had committed is certainly evidence enough to indicate that he did not consider the filing of the appeal to be frivolous and not in good faith.

In *Gideon* v. *Wainwright,* 372 U.S. 335, this Honorable Court reconsidered and over-ruled *Betts* v. *Brady,* 316 U.S. 455, holding:

> "In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. * * * That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. * * * From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man

charged with crime has to face his accusers without a lawyer to assist him.

"* * * The judgment is reversed and the cause is remanded * * *"

The Gideon case firmly established the law that the Constitution makes no distinction between capital and noncapital cases and that a criminal defendant's rights and guarantees under the Constitution is made applicable to the States.

In the present case the petitioner was an indigent defendant and unable to hire an attorney to protect his rights. That was also his situation at the time his court-appointed attorney was permitted to withdraw from the appeals case and at time the appeal was dismissed. The fact that the petitioner was able later to obtain counsel of his own choice should have no bearing in the matter. The harm had already been done.

II

Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court failed to give due and adequate notice to appellant-defendant before granting order of default?

On January 26, 1965, the Supreme Court extended time for filing appellant's brief to and including March 1, 1965. At that time the petitioner was still being represented by attorney Ail. While the record does not disclose to whom said order was sent, it can be presumed that Mr. Ail was the sole recipient thereof. (Appendix H) The record further discloses that the notice of dismissal of appeal of March 16, 1965, from the Clerk of the Supreme Court was sent only to Mr. Ail, who had previously withdrawn from the case and therefore had no further connection or interest therein,

and to the State's attorney. (Appendix J) No copy of said notice was sent to the petitioner, who was without legal representation at the time.

The term "due process of law" is synonymous with "the law of the land," its essential elements are notice and an opportunity to be heard and to defend in an orderly procedure adapted to the nature of the case, and it means a law which hears before it condemns, which proceeds on inquiry, and which renders judgments only after trial. Included within this requisite is an opportunity to be heard, and reasonable opportunity to prepare for a hearing, which, of course, encompasses reasonable notice of any action which the court contemplates in the proceeding.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the action of the court and to afford them an opportunity to appear and present their objections or request for relief. *Roller* v. *Holley,* 176 U.S. 398; *Priest* v. *Las Vegas,* 232 U.S. 604; *Grannis* v. *Ordean,* 234 U.S. 385; *Milliken* v. *Meyer,* 311 U.S. 457.

An appellate court should not be relieved of any responsibility placed on any lower court in the matter of due process. Here the petitioner had no one else to assert his rights and to take such steps as would protect him from the contemplated action of the Supreme Court. He was unaware of the significance of the Court's order. The Court therefore deprived the petitioner of due process when it failed to give him timely notice and to advise him fully as to the significance of the order of the Court.

III

Did the Court deprive the petitioner of his rights under the Constitution of the United States when it denied appellant-defendant's motions for relief from default?

On May 25, 1965, the appellant-defendant through his new counsel, L. B. Sandblast, filed motion to relieve appellant or order of default (Appendices N-O) in which he stated that, among other things, the appellant was not given notice of the time limit within which to file his brief; that no substitution of attorney was made in this appeals case. On June 2, 1965, the Court denied said motion. On June 28, 1965, motion was filed for reconsideration. That motion was denied by the Court on June 29, 1965.

The Court under Chapter 19,033 hereinbefore set forth (Page 6) in its discretion "may permit the party responsible for the omission to rectify the omission, by amendment or otherwise, on such terms and within such time as may be just."

Under the circumstances of this case, especially in view of the fact that the petitioner was without counsel and without knowledge of the action of the Court, the Supreme Court should have held that the appellant's omission was with reasonable excuse. Therefore, the Court's action in permitting the default to stand and dismissing the appeal was an abuse of its discretion and arbitrary and capricious, and in violation of the petitioner's constitutional rights.

CONCLUSION

For the reasons discussed above, petitioner submits that a writ of certiorari should issue to review the decision of the court below.

Respectfully submitted,

MAURICE A. GUERVITZ
1010 Vermont Avenue, N. W.
Washington, D. C.

MILTON HELLER
Washington Building,
Washington, D. C.

Attorneys for Petitioner

Date: August 23rd, 1965